In the

Supreme Court of the United States

October Term, 1972

No. 888

H. Keith Zahn and Valerie Zahn, Charles Lemire and Marion L. Lemire, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

—v.—

International Paper Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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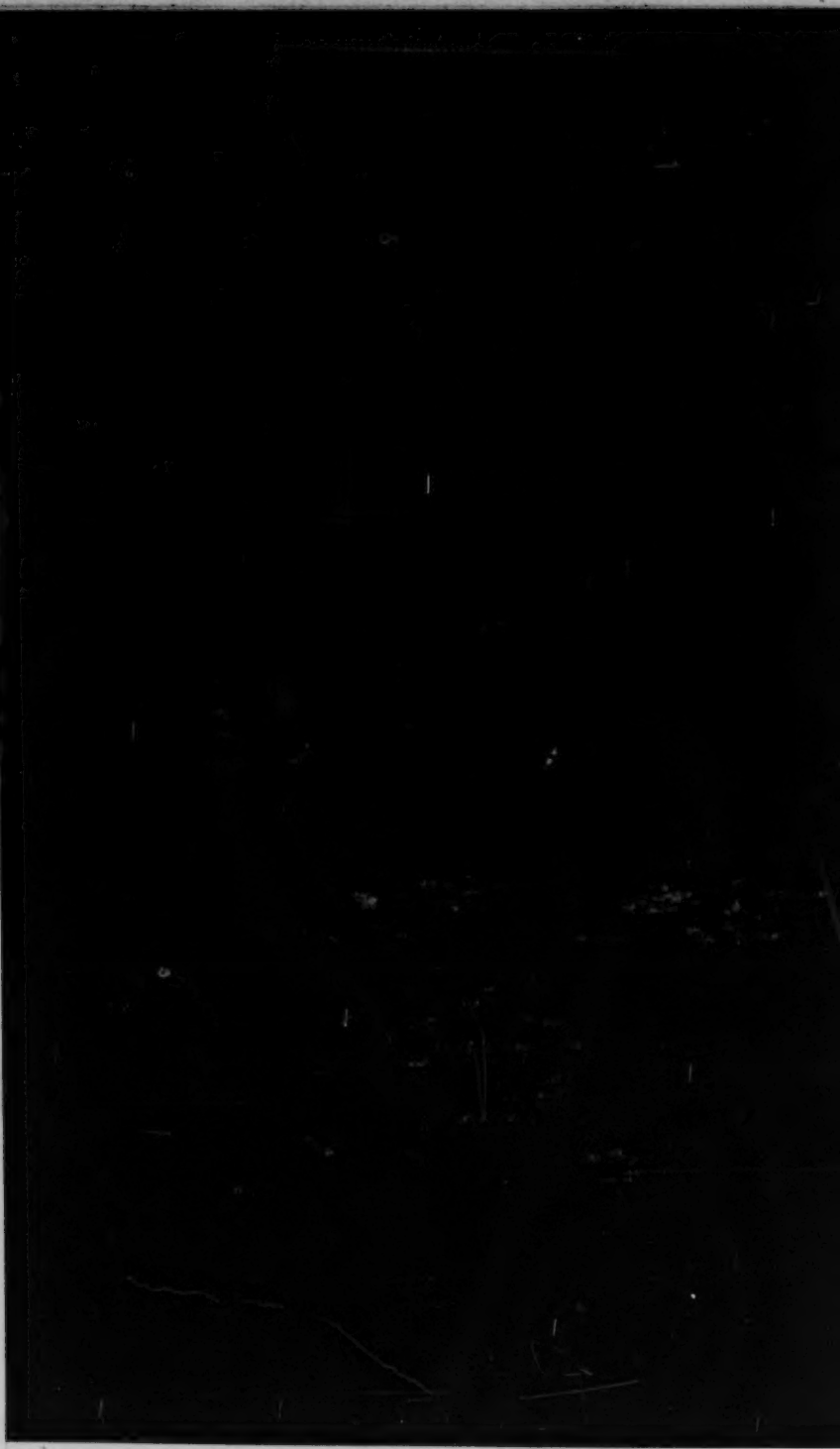

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QUESTION PRESENTED

As stated by the Court of Appeals, the question presented is "whether a diversity case will be allowed to proceed as a class action under Fed. R. Civ. P. 23(b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U.S.C. §1332(a) but the unnamed representatives of the class do not." (Petition, Appendix A, at 16.)

STATUTES AND RULES INVOLVED

The pertinent provisions of 28 U.S.C. §1332(a) and Fed. R. Civ. P. 23 are set forth in the Petition at pp. 3-4.

Also involved is Fed. R. Civ. P. 82 which provides:

"JURISDICTION AND VENUE UNAFFECTED

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

and 28 U.S.C. §2072 which provides in pertinent part:

"Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

• • • • •"

STATEMENT OF THE CASE

This action, brought by four named owners of lakefront property on the Vermont side of Lake Champlain on behalf of themselves and some 200 other similarly situated riparian landowners and lessees, seeks compensatory and punitive damages for alleged injury to their property and leaseholds caused by the alleged pollution of the Lake's waters from the operation of Respondent's now-closed pulp and paper manufacturing plant at Ticonderoga, New York. The action apparently is based on theories of common law trespass and nuisance and seeks to invoke federal jurisdiction on the basis of diversity of citizenship and requisite monetary amount under 28 U.S.C. §1332(a). The complaint alleges that the four named plaintiffs each suffered damages in excess of $10,000 but contains no allegations as to the damages of the unnamed members of the proposed class.

The District Court held that this suit may not be maintained as a class action under Fed. R. Civ. P. 23, applying the principle of *Snyder* v. *Harris*, 394 U.S. 332 (1969), that

> "each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount." (Petition, Appendix C, at 44.)

Judge Leddy found that in this case

> "it is unlikely that the property of every lakefront landowner in the towns of Orwell, Shoreham, and Bridport is valued at $10,000, and, to a legal certainty, it is not credible that every such owner has suffered pollution damage in excess of $10,000." (Petition, Appendix C, at 42.)

Under these circumstances, he concluded that the problem of defining a class was "insuperable". (Petition, Appendix C, at 47.) He also concluded that any attempted definition of the class before trial by requiring each member of the class to show the amount of his damages

> "would eliminate any advantage of a class action over joinder" (*Id.*)

and thus be improper under the Rule 23(b)(3) requirement that class action treatment be superior to other methods of adjudication. (*Id.*) He further concluded that definition of the class could not be postponed until after trial on the issue of liability because if liability were found not to exist

> "the *res judicata* effect of the judgment would depend on an evaluation at some future date of whether a given class member had $10,000 in controversy at the time of this action." (*Id.*)

If, on the other hand, liability were found to exist,

> "the question of jurisdiction would be hopelessly intertwined with the determination of damages." (*Id.*)

The Court held that such an *ex post facto* determination of whether a party had been a member of the class would be "an impossible task" and contrary to the purpose of Rule 23 as amended in 1966. (*Id.*)

The District Court's order was affirmed by the Court of Appeals for the Second Circuit on interlocutory appeal pursuant to 28 U.S.C. §1292(b), with Judge Timbers dissenting. While acknowledging that *Snyder* does not squarely hold that every unnamed member of the class in a spurious class suit must satisfy the jurisdictional amount

requirement (Petition, Appendix A, at 18), the majority considered that Petitioners' attempt to escape the ambit of *Snyder* by arguing that only *some* of the plaintiffs need meet the jurisdictional amount requirement—the same argument they make here—was met by persuasive internal evidence that this Court did not so limit the rule enunciated in *Snyder*. (Petition, Appendix A, at 18-20.)

The Court of Appeals noted that in *Snyder* this Court "stressed that the aggregation doctrine, grounded in the statutory phrase 'matter in controversy', far antedated Rule 23." (Petition, Appendix A, at 19.) In support of its position in *Snyder*, this Court relied on *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939). The Court of Appeals observed that this "Court's reliance on *Clark* appears to offer an insurmountable obstacle to appellants, for the *Clark* Court had recognized that one originally named member of the proposed class might meet the jurisdictional amount requirement, just as the named plaintiffs do here; yet the action was dismissed as to all plaintiffs except one." (Petition, Appendix A, at 19-20.) As the Court of Appeals emphasized, the "point is that in a spurious class action one plaintiff may not ride in on another's coattails." (Petition, Appendix A, at 20.)

While recognizing that amended Rule 23 should be given a liberal interpretation in order to vindicate small federal claims, the Court of Appeals held that the policies underlying the Rule are not determinative of the case at bar. Rather, in light of *Snyder* the fundamental consideration must be 28 U.S.C. §1332(a). (Petition, Appendix A, at 20.) The purpose of the jurisdictional amount requirement in that Section was found to be advanced by denying class action treatment here, for the class action—with approxi-

mately 200 separate and distinct claims—would be "enormously time consuming". (Petition, Appendix A, at 21.) The Court of Appeals also observed that "the Advisory Committee did not intend that Rule 23(b)(3) ordinarily be utilized in a mass tort situation." (Petition, Appendix A, at 21.)

Judge Timbers' dissent argued that under ancillary jurisdiction concepts the class action should be permitted to continue. (Petition, Appendix A, at 22-31.)

ARGUMENT

The Question Presented Is Governed by *Snyder* v. *Harris* and Hence Does Not Warrant Consideration by This Court.

Since 1832 the settled doctrine in the federal courts has been that separate and distinct claims joined in a single action, whether or not such action is designated as a "class", must each meet any Congressionally established jurisdictional amount. *See e.g., Snyder* v. *Harris,* 394 U.S. 332 (1969); *Pinel* v. *Pinel,* 240 U.S. 594 (1916); *Oliver* v. *Alexander,* 31 U.S. 143 (1832); *Steele* v. *Guaranty Trust Co. of New York,* 164 F.2d 387 (2d Cir. 1947), *cert. denied,* 333 U.S. 843 (1948); *Hackner* v. *Guaranty Trust Co. of New York,* 117 F.2d 95 (2d Cir.), *cert. denied,* 313 U.S. 559 (1941). This rule has not been altered and logically could not have been altered by the 1966 amendments to Rule 23. Despite the explicit warning in Rule 82 that the Federal Rules of Civil Procedure ". . . shall not be construed to extend . . . the jurisdiction of the United States district courts . . .", some proponents of "liberalization" through

the magic of amended Rule 23 seem to think that this Rule has created a single mass of which only the front need appear, and only that front need meet the jurisdictional amount. But as a matter of logic and consistent interpretation, the unnamed members of a spurious class are just as obliged to meet statutory jurisdictional requirements as are the named plaintiffs. Anonymity cannot defeat a Congressional requirement deliberately enacted and re-enacted several times for the purposes of making the federal court calendars workable and relegating small claims to the state courts, particularly in diversity cases. *See* S. Rep. No. 1830, 85th Cong., 2d Sess. (1958); in 2 U.S. Code Cong. & Adm. News 3099, 3100-01 (1958).

The question presented here is answered by the principles laid down in *Snyder* v. *Harris*, 394 U.S. 332 (1969). As the Court of Appeals stated, there is "persuasive internal evidence" in the *Snyder* opinion that the rule there enunciated requires that *each* member of a spurious class satisfy the jurisdictional amount requirement. (Petition, Appendix A, at 19.)

This interpretation of *Snyder* is further supported by the reliance in the *Snyder* opinion on *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939), where the fact that a named plaintiff had a claim in the jurisdictional amount was not enough to save the jurisdictionally deficient claims of other potential plaintiffs. We submit that there is no valid reason why this Court now should reconsider its holdings in *Snyder* and *Clark*.

The dissenting opinion of Judge Timbers does not appear to question that *Snyder* imposes a jurisdictional amount requirement on unnamed plaintiffs in a spurious class, but rather suggests that where at least one named

plaintiff meets this requirement, *Snyder* can be avoided by the device of ancillary jurisdiction. (Petition, Appendix A, at 22 *et seq.*) But to reach this conclusion, as Petitioners urge here, the principles laid down in *Snyder* must be disregarded; and *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939) and *Alvarez* v. *Pan American Life Insurance Co.*, 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967), in both of which at least one of the plaintiffs had a claim in the requisite amount, must be overruled.

The effect of the *Snyder* doctrine as applied by the Court of Appeals in this case is not, as Petitioners contend, to render "the class action device unavailable to the small claimant". (Petition, at 8.) Principles of non-aggregation have not affected and do not affect true and hybrid class actions, and they affect spurious class actions only where Congress has established a jurisdictional amount requirement. The very same contentions here advanced by Petitioners were put forward in *Snyder* (394 U.S. at 338) and rejected, with this Court stating that those contentions are not sufficient to justify the Court's abandoning a judicial interpretation of Congressional language that has stood for more than a century and a half. (394 U.S. at 338-39) To give way to those contentions now would, as in *Snyder*,

> "allow aggregation of practically any claims of any parties that for any reason happen to be brought together in a single action. This would seriously undercut the purpose of the jurisdictional amount requirement . . . . [and] add to the burdens of an already overloaded federal court system" (394 U.S. at 340-341)

and further would expand the jurisdiction of the federal courts in violation of 28 U.S.C. §2072 and Fed. R. Civ. P. 82. (394 U.S. at 341)

In short, Petitioners have asserted no compelling reason why this Court should now review and re-evaluate the policy considerations already raised and thoroughly examined in *Snyder*.

Nor does Petitioners' ancillary jurisdiction argument warrant review by this Court. The narrow question posed by Petitioners is whether it was improper for the District Court to fail to invoke the principle of ancillary jurisdiction in order to evade the jurisdictional amount requirement of 28 U.S.C. §1332(a). The short answer is that *Snyder* and its predecessors do not permit such judicial expansion of the limited diversity jurisdiction granted by Congress under 28 U.S.C. §1332(a).

There is no basis to Petitioners' contention (Petition, at 10) that the lower courts "are already split" on the ancillary jurisdiction question and that this Court should resolve the "split". In fact, resolution is not necessary because there is no conflict. The courts of appeals which have previously passed on the question are in agreement that ancillary jurisdiction cannot be used to permit joinder of plaintiffs having separate and distinct claims which do not meet the jurisdictional amount. *Hymer* v. *Chai*, 407 F.2d 136 (9th Cir. 1969); *Aetna Insurance Co.* v. *Chicago, R.I. & P. R.R.*, 229 F.2d 584 (10th Cir. 1956); *Hackner* v. *Guaranty Trust Co. of New York*, 117 F.2d 95 (2d Cir.), *cert. denied*, 313 U.S. 559 (1941); *Takashi Kataoka* v. *May Department Stores Co.*, 115 F.2d 521 (9th Cir. 1940), *cert. denied*, 312 U.S. 700 (1941).

This uniformity in the decisions of the courts of appeals is not undermined by the cases cited by Petitioners in support of their assertion that there is a split in the "courts below". (Petition, at 10.) Of the cases cited by

Petitioners, several involve derivative claims coupled with special relationships (*e.g.*, husband and wife, guardian and child)—not separate and distinct claims as in the case at bar—and therefore are inapposite. *Hatridge* v. *Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969); *Wilson* v. *American Chain & Cable Co.*, 364 F.2d 558 (3d Cir. 1966); *Wiggs* v. *City of Tullahoma*, 261 F.Supp. 821 (E.D. Tenn. 1966). The other cases cited by Petitioners in support of their position involving joinder of plaintiffs (Petition, at 10) are district court cases (*Lucas* v. *Seagrave Corp.*, 277 F.Supp. 338 (D. Minn. 1967); *Johns-Manville Sales Corp.* v. *Chicago Title & Trust Co.*, 261 F. Supp. 905 (N.D. Ill. 1966)) and do not warrant the grant of certiorari here. R. Stern and E. Gressman, SUPREME COURT PRACTICE 162 (4th ed., 1969).

None of the remaining cases cited by Petitioners (Petition, at 10) as representing a "split" of authority dealt with the issue of joinder of plaintiffs, where the matter of jurisdictional amount would be relevant. *General Research, Inc.* v. *American Employers' Insurance Co.*, 289 F.Supp. 735 (W.D. Michigan 1968), *Jacobson* v. *Atlantic City Hospital*, 392 F.2d 149 (3d Cir. 1968) and *Stone* v. *Stone*, 405 F.2d 94 (4th Cir. 1968) are cases in which ancillary jurisdiction was used to facilitate the joinder of defendants. *Jewell* v. *Grain Dealers Mutual Insurance Co.*, 290 F.2d 11 (5th Cir. 1961), advanced by Petitioners as a contrary decision, involved the rejection of joinder of defendants. Even if these cases constitute a conflict in the lower courts on the question of joinder of defendants, that question is not presented by this case, which involves the quite different issue of the formation of a class of plaintiffs under Fed. R. Civ. P. 23(b)(3) in a mass tort action. The policy reasons

which favor allowing a single plaintiff to join in one action his claims against many defendants who have all injured him in the course of a single transaction are quite different from those with respect to joinder of a multitude of otherwise unrelated plaintiffs, each with a separate and distinct claim, in connection with a mass tort action under Rule 23 (b)(3).

United Mine Workers of America v. *Gibbs*, 383 U.S. 715 (1966), cited by the dissent (Petition, Appendix A, at 25-27, 29, 30) does not support Petitioners' argument that the doctrine of ancillary jurisdiction permits the inclusion in a spurious class action based on diversity jurisdiction of persons whose separate and distinct claims are not in excess of $10,000. At issue in *Gibbs* was the joinder of *claims* (pendent jurisdiction) rather than joinder of *plaintiffs* (ancillary jurisdiction) so there was no reason for *Gibbs* to consider 28 U.S.C. §1332(a).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Dated: New York, New York
January 8, 1973

Respectfully submitted,

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CERTIFICATE OF SERVICE UNDER RULE 33

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Respondent.

RICHARD E. NOLAN, one of the attorneys for respondent, International Paper Company, and a member of the Bar of this Court, certifies that on the 8th day of January, 1973 three copies of the Brief in Opposition to Petition for Certiorari were served on Peter F. Langrock, Esq., Langrock and Sperry, Drawer 351, Middlebury, Vermont 05753, attorney for Petitioners, by depositing the same in a mail box maintained by the United States Postal Service at One Chase Manhattan Plaza, New York, New York 10005, with first class postage prepaid.

January 8, 1973

s/ RICHARD E. NOLAN
Richard E. Nolan